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# Situation of human rights in the Palestinian territories occupied since 1967*

## Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, submitted in accordance with Human Rights Council resolution 5/1.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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# Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967

*Summary*

The Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, hereby submits his second report to the General Assembly. The report is based primarily on information provided by victims, witnesses, civil society representatives, United Nations representatives and Palestinian officials in Amman, in connection with the mission of the Special Rapporteur to the region in May 2017. The report addresses a number of concerns pertaining to the situation of human rights in the West Bank, including East Jerusalem, and in Gaza.

# I. Introduction

1. The present report provides a brief overview of the most pressing human rights concerns in the Occupied Palestinian Territory at the time of its submission, as identified by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 in conversations and meetings with civil society. The report then presents a detailed analysis of the international legal framework of the occupation as it continues past its fiftieth year.

2. The Special Rapporteur would like to draw attention to the fact that, while he stands ready to conduct a mission to the Occupied Palestinian Territory, permission to do so has not been granted by the Israeli authorities. The Special Rapporteur has regularly requested access to the Occupied Palestinian Territory from Israel, most recently on 24 March 2017. As at the writing of the present report, no reply had been received. The Special Rapporteur notes that his two immediate predecessors in this position were similarly not given access to the Occupied Palestinian Territory. The Special Rapporteur further notes that an open dialogue among all parties is essential for the protection and promotion of human rights and emphasizes that he is ready and willing to engage with all parties. In addition, he emphasizes that access to the territory is an important component in the development of a comprehensive understanding of the situation. This pattern of non-cooperation with the mandate is a serious concern. A full and comprehensive understanding of the situation based on first-hand observation is extremely beneficial to the work of Special Rapporteurs.

3. The report is based primarily on written submissions as well as consultations with civil society representatives, victims, witnesses, Palestinian government officials and United Nations representatives held in Amman during the Special Rapporteur's annual mission to the region in May 2017.

4. In the present report, the Special Rapporteur focuses on the human rights and humanitarian law violations committed by Israel, as set out in the mandate of the Rapporteur.[1] The Rapporteur notes that human rights violations by any State party or non-State actor are deplorable and will only hinder the prospects for peace.

5. The Special Rapporteur wishes to express his appreciation for the full cooperation with his mandate extended by the Government of the State of Palestine. The Special Rapporteur also wishes to extend his thanks to all those who travelled to Amman to meet with him and to those who were unable to travel but made written or oral submissions. The Special Rapporteur acknowledges the essential work done by human rights defenders and civil society and expresses his commitment to supporting this work as much as possible.

6. The Special Rapporteur would like to note that several groups were unable to travel to Amman to meet with him owing to travel restrictions imposed by the Israeli authorities. This was particularly the case with individuals coming from Gaza; as a result, all individuals and organizations based in Gaza were consulted by videoconference.

# II. Current human rights situation

7. In the fiftieth year of the occupation, the human rights situation in the Occupied Palestinian Territory is in a state of severe deterioration. The human rights and humanitarian law violations associated with the occupation have an impact on

[1] As specified in the mandate of the Special Rapporteur set out in Commission on Human Rights resolution 1993/2.

every aspect of life for Palestinians living in the West Bank, including East Jerusalem, and Gaza. The present report does not provide a comprehensive overview of all issues of concern, but instead seeks only to highlight some of the most urgent concerns at this moment.

## A. Gaza

8. Since April 2017, Gaza has been facing a severe electricity crisis, which deteriorated even further over the course of June. As at the time of writing of the present report, no durable solution has been found and the people of Gaza are living with often as little as four hours of electricity per day.[2] Gaza continued to experience electricity outages of 18–20 hours per day, undermining the provision of basic services.[3] The right to health for Palestinians is of particular concern as a result of this crisis, as hospitals and medical facilities are severely affected by the lack of electricity. Hospitals are postponing elective surgeries and are forced to discharge patients prematurely. In addition, water supplies are at risk, with most homes receiving water through the piped network for only a few hours every three to five days, while the desalination plants are functioning at only 15 per cent of their capacity. More than 108 million litres of untreated sewage were reportedly being discharged into the Mediterranean Sea every day.[4] The World Health Organization (WHO) noted that targeted humanitarian interventions were preventing "the complete collapse of the health sector" during the crisis.[5]

9. It must be noted that the humanitarian crisis in Gaza, both the recent sharp decline in the situation as well as the long-term challenges faced in Gaza over the past 10 years, is entirely human made. The current electricity crisis (the result of Israel's reduction in its supply of electricity to Gaza stemming from a decision of the Palestinian Authority prompted by the internal political divide between Hamas and Fatah) was entirely preventable. In addition, Israel, as the occupying power (A/HRC/34/38, paras. 10–12), is obligated to ensure that adequate hygiene and public health standards are maintained in the occupied territory, as well as to ensure the provision of food and medical care to the population under occupation.[6] The Special Rapporteur calls upon all parties to respect their obligations to the people of Gaza under international human rights and international humanitarian law.

10. Compounding the health concerns raised by the electricity crisis are the increasing difficulties faced by patients seeking to travel through the Erez crossing point out of Gaza for medical treatment. The rate of Israel's denial or delay of permit requests rose in the second half of 2016 (A/HRC/34/70, para. 21). In July 2017, the situation remained concerning. Of permit applications in the month of July, 42.6 per cent were denied or delayed (787 applications).[7] Delayed response

[2] See www.haaretz.com/middle-east-news/palestinians/1.800735.

[3] Office for the Coordination of Humanitarian Affairs, "Humanitarian bulletin: Occupied Palestinian Territory" (August 2017). Available from www.ochaopt.org/sites/default/files/hummonitor_august_2017_2.pdf.

[4] Office for the Coordination of Humanitarian Affairs, "Gaza crisis: urgent funding appeal" (July 2017). Available from www.ochaopt.org/sites/default/files/gaza_urgent_humanitarian_funding_v5_3july2017_10am_1.pdf.

[5] World Health Organization (WHO), "WHO situation report: Gaza, Occupied Palestinian Territory — July to August 2017". Available from www.emro.who.int/images/stories/palestine/WHO-Special-Situation-Report-on-_Gaza_July_-_August._.pdf?ua=1.

[6] Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (Fourth Geneva Convention), arts. 55 and 56.

[7] WHO, "Health access for referral patients from the Gaza Strip", monthly report (July 2017). Available from http://www.emro.who.int/images/stories/palestine/documents/WHO_monthly_Gaza_access_report_July_2017.pdf?ua=1.

times can lead to patients missing appointments and delaying critical care. In August 2017, five cancer patients died while awaiting permits to travel for needed care.[8]

## B. West Bank

11. The previous report of the Special Rapporteur highlighted the sharp rise in announcements of new settlement construction seen at the start of 2016 (A/HRC/34/70, paras. 9–12). According to Peace Now, there have been tenders for construction of 2,858 housing units since the start of 2017, a significant increase over 2016 (42 housing units) and more than have been recorded in the past 10 years at least.[9] In addition, for the first time in 25 years, the Prime Minister of Israel, Benjamin Netanyahu, announced a new settlement, on which ground was broken for construction in June.[10]

12. Accompanying the announcements above, there have been a number of statements from political leaders calling for continued settlement expansion and in many cases annexation.[11] At the beginning of the year, Mr. Netanyahu reportedly said, in a meeting with members of the inner security cabinet, that he had lifted all restrictions on construction in East Jerusalem and that he would also advance construction in West Bank settlements.[12]

13. These statements, combined with the reality of the expansion of settlements and extensive announcements of new construction, put the two-state solution on life support, with a fading pulse, and ensure the continuation of human rights violations associated with settlements, including limitations on freedom of movement affecting the rights to education and health, heightened risk of arrest and arbitrary detention, use of land and natural resources thus hindering Palestinians' right to development, and many others. In addition, as emphasized in the Special Rapporteur's report to the Human Rights Council in 2017, Palestinians and Israelis seeking to draw attention to these human rights violations are increasingly targeted — in the West Bank with arrest and arbitrary detention and in Israel with campaigns and legislation seeking to delegitimize the work of human rights organizations (see A/HRC/34/70).

## C. East Jerusalem

14. In East Jerusalem, as in the rest of the West Bank, settlements, as well as the demolition of homes and the displacement of Palestinians, are of deep concern. On 2 October 2017, Mr. Netanyahu announced his support for the Greater Jerusalem Bill — legislation that would reportedly extend the municipal boundaries of

[8] Ibid., (August 2017). Available from www.emro.who.int/images/stories/palestine/documents/WHO_monthly_Gaza_access_report_Aug_2017_Final.pdf?ua=1.

[9] See http://peacenow.org.il/en/settlements-watch/settlements-data/construction.

[10] Peter Beaumont, "Israel begins work in first settlement in 25 years as Jared Kushner flies in", *The Guardian*, 20 June 2017. Available from www.theguardian.com/world/2017/jun/20/israel-new-settlement-benjamin-netanyahu-jared-kushner-amichai-amona; and Maayan Lubell, "Israel cabinet approves first West Bank settlement in 20 years", Reuters, 30 March 2017. Available from www.reuters.com/article/us-israel-palestinians-settlement/israeli-cabinet-approves-first-west-bank-settlement-in-20-years-idUSKBN1711K6.

[11] Amnesty International, "Israel/Occupied Palestinian Territory: a call to States to stop sustaining illegal settlements", public statement, 7 June 2017. Available from www.amnesty.nl/content/uploads/2017/06/Public-Rationale-English.pdf?x41591, p.2.

[12] Barak Ravid, "Netanyahu pledges unrestricted construction in East Jerusalem, settlement blocs", *Haaretz*, 22 January 2017. Available from www.haaretz.com/israel-news/.premium-1.766796.

Jerusalem to include a number of settlements.[13] Accompanying moves such as this, demolitions and evictions of Palestinian residents of East Jerusalem continue at a high rate, with 116 total demolitions recorded from the start of the year through mid-September 2017, displacing 202 people.[14] Demolitions in East Jerusalem are justified by the occupying power on either an administrative basis (when buildings are built without proper permits, although permits are nearly impossible for Palestinians to obtain) (A/HRC/34/38, para. 26), or as a punitive measure against families of attackers or alleged attackers (A/HRC/34/36, para. 31, and A/HRC/34/38, paras. 30–33).

## III. Legal framework of occupation

15. In June 2017, Israel's occupation of the Palestinian territory (the West Bank, including East Jerusalem, and Gaza) marked its fiftieth anniversary. This is the longest-running military occupation in the modern world.[15] Notwithstanding insistent calls by the international community, most recently in 2016, that the Israeli occupation must come to a complete end,[16] that many of its features are in profound breach of international law,[17] and that its perpetuation both violates the fundamental right of the Palestinian people to self-determination[18] and undermines the possibility of a two-state solution,[19] it has become more entrenched and harsher than ever. Indeed, the Israeli occupation has become a legal and humanitarian oxymoron: an occupation without end.[20]

16. These resolutions adopted by the Security Council and the General Assembly in 2016 are far from the first time that the international community has spoken with urgency about ending Israel's occupation. Thirty-seven years ago, in June 1980, the Council, sufficiently alarmed by the duration and severity of the occupation and Israel's defiance of prior resolutions, adopted resolution 476 (1980). At the time, the Israeli occupation was already 13 years old. In resolution 476 (1980), the Council reaffirmed the overriding necessity to end the prolonged occupation of Arab territories occupied by Israel" and strongly deplored the continuing refusal of Israel to comply with the relevant resolutions of the Security Council and the General Assembly.

17. The inability to end the Israeli occupation has been an abject failure of international diplomacy, a darkening stain on the efficacy of international law and the source of multiple broken promises to the Palestinian people. Nor does the prolongation of this occupation serve the people of Israel, for it corrodes their society and their public institutions by entangling them in their Government's drive

[13] Peter Beaumont, "Netanyahu backs annexation of 19 West Bank settlements", *The Guardian*, 3 October 2017. Available from www.theguardian.com/world/2017/oct/03/netanyahu-backs-annexation-of-west-bank-settlements.

[14] Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, "Protection of civilians, reporting period: 12–25 September 2017". Available from www.ochaopt.org/content/protection-civilians-report-12-25-september-2017.

[15] International Committee of the Red Cross (ICRC), "Fifty years of occupation: where do we go from here?", 2 June 2017. Available from www.icrc.org/en/document/fifty-years-occupation-where-do-we-go-here.

[16] See General Assembly resolution 71/23.

[17] Ibid. See also resolution 71/97.

[18] See General Assembly resolution 71/184.

[19] See Security Council resolution 2334 (2016).

[20] John Kerry, Secretary of State of the United States of America, in his "Remarks on Middle East peace" on 28 December 2016, warned against Israel's "permanent occupation", "perpetual occupation" and "seemingly endless occupation" of the Palestinian territory; see https://2009-2017.state.gov/secretary/remarks/2016/12/266119.htm.

to foreclose a viable and just solution to the half-century of occupation and the century-long conflict, and makes them the beneficiaries — unwittingly or not — of a profoundly unequal and unjust relationship.

18. If Israel's occupation of the Palestinian territory by 1980 was already prolonged and if it was already a matter of overwhelming necessity to end it, and Israel had already demonstrated by 1980 its unwillingness to comply with the explicit directions of the international community, how are we, in 2017, to characterize the occupation? The prevailing approach of the international community has been to treat Israel as the lawful occupant of the Palestinian territory, albeit an occupant that has committed a number of grave breaches of international law in its conduct of the occupation, including the settlement enterprise,[21] the construction of the wall,[22] the annexation of East Jerusalem[23] and the systemic violations of Palestinian human rights.[24] In the view of the Special Rapporteur, while the lawful occupant approach may have been the appropriate diplomatic and legal portrayal of the occupation in its early years, it has since become wholly inadequate both as an accurate legal characterization of what the occupation has become and as a viable political, diplomatic and legal catalyst to compel Israel to completely and finally terminate the occupation in accordance with its international legal obligations.

19. In the present report, the Special Rapporteur considers whether Israel's role as an entrenched and defiant occupant of the Palestinian territory has now reached the point of illegality under international law. To make this determination, the core principles that govern the lawful conduct of an occupation under the relevant principles of international law are identified and employed to examine Israel's administration of the Occupied Palestinian Territory and assess whether Israel's role as the occupying power remains lawful or not.

## A. General principles of international law and occupation

20. Two decades into the twenty-first century, the norm that guides our global community is that people are citizens, not subjects, of the State that rules them. Accordingly, they are entitled to express their legal identity and their inalienable rights through their sovereign State. Colonialism, occupation and other forms of alien rule are very much the exception to this norm, and they can only be justified in law and international practice as a short-term and abnormal condition that is leading unhesitatingly towards self-determination and/or sovereignty. Most other forms of alien rule would be, ipso facto, unlawful.

21. In our modern world, fundamental rights and protections (including protections under international humanitarian law, civil and political rights such as the right to self-determination, and economic, social and cultural rights) are to be given a purposive and broad interpretation and a liberal application. This is because they embody the rights and freedoms that go to the core of our humanity and are meant to be universally available to, and actionable by, all of us.[25] Conversely, exceptions to these fundamental rights (such as military necessity, significant threats to national security or public emergencies) are to be interpreted and applied in a

[21] See Security Council resolution 2334 (2016).

[22] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 142.

[23] See Security Council resolution 478 (1980). See also General Assembly resolution 71/25.

[24] See General Assembly resolution 71/98.

[25] International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

measured and narrow fashion, so as not to unduly impair the breadth, accessibility and enjoyment of these fundamental rights by all peoples.[26]

22. Created in the aftermath of the bitter experiences of total war and extreme civilian suffering in the nineteenth and twentieth centuries, international humanitarian law is embodied in the Regulations annexed to the Convention respecting the Laws and Customs of War on Land of 1907 (the Hague Regulations), the Geneva Convention relative to the Protection of Civilians in Time of War of 12 August 1949 (the Fourth Geneva Convention) and the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts of 1977 (Protocol I), among other instruments, as well as in the practices of the modern world. Three of the core purposes of modern international humanitarian law as related to foreign military occupation are: (a) to closely regulate an occupation to ensure that the territory achieves, or is restored to, a state of sovereignty; (b) to prevent the territory from becoming a fruit of conquest; and (c) to safeguard the protected people under occupation. As with other areas of international law, international humanitarian law is constantly evolving — within the natural scope of its foundational instruments, principles and purposes — to address new challenges in humanitarian protection in situations where the answers are not always expressly laid out in these primary documents.[27]

23. Two of the most significant developments in international law in recent years have been the acceptance that international human rights law, including the overarching right to self-determination, is integral to the application of the laws of occupation. The International Court of Justice has affirmed that international human rights law continues to apply in times of conflict and throughout an occupation.[28] In practice, this means that humanitarian law and human rights law are intended to be complementary, not mutually exclusive, in their application to an occupation,[29] and the protected people under occupation are to enjoy the full panoply of human rights, subject only to any legitimate derogations that are scrupulously justified either by emergencies or the requirements of military rule under occupation.[30]

24. As well, the right of peoples to self-determination, recognized as a right *erga omnes* in international law,[31] applies to all peoples under occupation and other forms of alien rule.[32] The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations provides that: "Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and

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[26] International Covenant on Civil and Political Rights, art. 4 ("... may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation ..."); and International Covenant on Economic, Social and Cultural Rights, art. 4.

[27] Eyal Benvenisti, *The International Law of Occupation* (Princeton, New Jersey, Princeton University Press, 2004) ("... it [is] not simply a task of looking up the relevant articles in The Hague Regulations or the Fourth Geneva Convention. International law has evolved significantly since the time these two instruments were drafted.").

[28] *Legal Consequences of the Construction of a Wall, Advisory Opinion*, paras. 106–113; and *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, paras. 178 and 179.

[29] Vaios Koutroulis, "The application of international humanitarian law and international human rights law in situations of prolonged occupation: only a matter of time?", *International Review of the Red Cross*, vol. 94, No. 885 (Spring 2012).

[30] Noam Lubell, "Human rights obligations in military occupation", *International Review of the Red Cross*, vol. 94, No. 885 (Spring 2012).

[31] *Legal Consequences of the Construction of a Wall, Advisory Opinion*, para. 88. This means that all States are required to do all that they can to secure self-determination for the people under alien rule.

[32] *Legal Consequences of the Construction of a Wall, Advisory Opinion*, para. 88.

freedom and independence".[33] In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice expressly affirmed the right of the Palestinian people to self-determination, that Israel has a duty to respect this right, and that a number of the features of the Israeli occupation had "severely impede[d]" the exercise of this right.[34] Furthermore, the evolution of the laws of occupation, and the application of the right to self-determination to these laws, has meant that sovereignty now lies with the people that live in the occupied territory and not in its government, and the occupying power is required to respect the political interests of this popular sovereignty, the people.[35]

25. Israel has occupied the Palestinian territory (the West Bank, including East Jerusalem, and Gaza) since June 1967. As such, the Fourth Geneva Convention applies in full. This legal determination has been affirmed by the Security Council on a consistent and regular basis, starting at the very beginning of the occupation in June 1967[36] and restated most recently in December 2016.[37] This is also the position stated at a 2014 Conference of High Contracting Parties to the Fourth Geneva Convention (A/69/711-S/2015/1, annex, para. 4). As such, the Palestinians in the occupied territory are "protected persons" under international humanitarian law, and are entitled to all of the protections of the Fourth Geneva Convention.[38] Israel has denied the application of the Fourth Geneva Convention and does not recognize the Palestinian territory as being occupied,[39] a position that the international community has widely rejected.[40]

26. With these principles and observations in mind, a four-part test is proposed to determine whether an occupier is administering the occupation in a manner consistent with international law and the laws of occupation, or whether it has exceeded its legal capacity and its rule is illegal.

## B. Test as to whether a belligerent occupier remains a lawful occupant

27. As the Israeli occupation of the Palestinian territory has lengthened in time, and with many of its features found to be in flagrant violation of international law, some international legal scholars have raised the issue of whether an occupation that was once regarded as lawful can cross a tipping point and become illegal. Professor Eyal Benvenisti has written that: "... it would seem that an occupant that in bad faith stalls efforts for a peaceful ending to its rule would be considered an aggressor and its rule would be tainted with illegality." Professors Ben-Naftali, Gross and Michaeli take a broader view, arguing that violation of any of the fundamental legal

[33] General Assembly resolution 2625 (XXV).

[34] *Legal Consequences of the Construction of a Wall, Advisory Opinion*, para. 122.

[35] Benvenisti, *The International Law of Occupation*.

[36] See Security Council resolution 237 (1967).

[37] See Security Council resolution 2334 (2016).

[38] Fourth Geneva Convention, art. 4.

[39] Israel, Ministry of Foreign Affairs, "Israel settlements and international law", 30 November 2015 ("In legal terms, the West Bank is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations"). Available from http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx. See also *Legal Consequences of the Construction of a Wall, Advisory Opinion*, paras. 90 and 93.

[40] See resolution 71/96, affirming the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, adopted by a vote of 168 to 6 with 6 abstentions. See also Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge, Cambridge University Press, 2017).

principles of occupation (listed below) "renders an occupation illegal per se".[41] Professor Gross has extended this argument more recently to emphasize the importance of analysing whether an indefinite or permanent occupation has become illegal, so as to counter "... the risk of occupation becoming conquest or a new form of colonialism while hiding behind an imagined temporality".[42] They have provided the intellectual foundation for the following test.

28. The four elements of the lawful occupant test are as set out below.

**(a) The belligerent occupier cannot annex any of the occupied territory**

29. A belligerent occupier cannot, under any circumstances, acquire the right to conquer, annex or gain any legal or sovereign title over any part of the territory under its occupation. This is one of the most well-established principles of modern international law and it enjoys universal endorsement. This is the corollary of Article 2, paragraph 4, of the Charter of the United Nations, which forbids its members from: "... the threat or use of force against the territorial integrity or political independence of any state ...". Leading public international law scholars have endorsed the "no annexation" principle as a binding legal doctrine.[43] The General Assembly unanimously codified the prohibition against acquiring title by conquest in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.

30. The occupying power cannot impose conditions or create facts on the ground that are designed to establish a claim for title. This principle is anchored in the well-established prohibition in international humanitarian law against the transfer of civilians from the occupying power into the occupied territory, embedded in the Fourth Geneva Convention (art. 49) and its Protocol I (art. 85). Furthermore, the Rome Statute of the International Criminal Court of 1998 (A/CONF.183/9) defined such an act as a war crime (art. 8, para. 2 (b) (viii)). This strict prohibition is intended to forestall an occupier from demographically transforming the territory in order to advance its claim for sovereignty and, simultaneously, undermine the right of the protected population to self-determination.[44]

31. With specific reference to Israel's occupation of the Arab, including Palestinian, territories captured in June 1967, the Security Council endorsed the principle of "the inadmissibility of the acquisition of territory by war" in resolution 242 (1967) in November 1967. The Council has since reaffirmed this principle on at least seven subsequent occasions dealing with Israel's annexations of Arab territory.[45] This principle has also been the longstanding position of the General

[41] Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal occupation: framing the Occupied Palestinian Territory", *Berkeley Journal of International Law*, vol. 23, No. 3 (2005).

[42] Gross, *The Writing on the Wall*. See also Ardi Imseis, "Prolonged occupation of Palestine: the case for a second advisory opinion of the International Court of Justice", lecture, 7 October 2015. Available from www.youtube.com/watch?v=X2ijqm1m2Ak.

[43] Malcolm N. Shaw, *International Law*, 8th ed. (Cambridge, Cambridge University Press, 2017) ("It is, however, clear today that the acquisition of territory by force alone is illegal under international law"); and Antonio Cassese, *International Law*, 2nd ed. (Oxford, Oxford University Press, 2005) ("... conquest does not transfer a legal title of sovereignty, even if it is followed by *de facto* occupation, and assertion of authority over the territory.").

[44] Report to the Commission on Human Rights Subcommission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1993/17), para. 17 ("Population transfer has been conducted with the effect or purpose of altering the demographic composition of a territory in accordance with policy objectives or prevailing ideology, particularly when that ideology or policy asserts the dominance of a certain group over another.").

[45] See Security Council resolutions 2334 (2016), 497 (1981), 478 (1980), 476 (1980), 298 (1971), 267 (1969) and 252 (1968).

Assembly.[46] The International Court of Justice held that the "... illegality of territorial acquisition resulting from the threat or use of force" has acquired the status of customary international law.[47] This absolute rule against the acquisition of territory by force makes no distinction as to whether the territory was occupied through a war of self-defence or a war of aggression; annexation is prohibited in both circumstances.[48]

**(b) The belligerent occupation must be temporary and cannot be either permanent or indefinite; and the occupant must seek to end the occupation and return the territory to the sovereign as soon as reasonably possible**

32. Belligerent occupation is inherently a temporary and exceptional situation where the occupying power assumes the role of a de facto administrator of the territory until conditions allow for the return of the territory to the sovereign,[49] which is the people of the territory. Because of the absolute prohibition against the acquisition of territory by force, the occupying power is prohibited from ruling, or attempting to rule, the territory on a permanent or even an indefinite basis.[50] As Professor Aeyal Gross has stated: "Temporality, together with the principles of self-determination and non-acquisition of territory by force, is what distinguishes occupation from conquest, and this distinction would be thwarted were occupation construed as indefinite."[51]

33. The laws of occupation do not set a specific length of time for the lawful duration of an occupation. However, the guiding principle that occupation is a form of alien rule which is a temporary exception to the norms of self-determination and sovereignty means that the occupying power is required to return the territory to the sovereign power in as reasonable and expeditious a time period as possible,[52] subject only to ensuring: (a) public safety and the security of the territory; (b) the resumption, or creation, of governing institutions and a functioning economy; and (c) the security of the occupying military. The occupying power, being obliged to work in good faith to achieve these goals consistent with the principles of the laws of occupation, would have no legitimate purpose to remain in the occupied territory beyond the time when conditions have allowed for the territory to be returned in toto to the sovereign power.[53] Indeed, the longer the occupation, the greater the justification that the occupying power must satisfy to defend its continuing presence in the occupied territory.

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[46] See, generally, General Assembly resolution 71/23.

[47] *Legal Consequences of the Construction of a Wall, Advisory Opinion*.

[48] Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford, Clarendon Press, 1996) ("... there has been widespread support for the view that Israel's incorporation of East Jerusalem is illegal on the grounds that ... the acquisition of territory by war, whether defensive or aggressive, is inadmissible ...").

[49] Jean S. Pictet, ed., *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, ICRC, 1958) ("The occupation of territory in wartime is essentially a temporary, de facto situation, which deprives the occupied power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights.").

[50] Ben-Naftali, Gross and Michaeli, "Illegal occupation" ("Occupation is temporary. It may be neither permanent nor indefinite.").

[51] Gross, *The Writing on the Wall*.

[52] In resolution 1483 (2003), dealing with the occupation of Iraq in 2003, the Security Council noted the commitment of the occupying powers to return the governance of Iraq to its people "as soon as possible".

[53] Ben-Naftali, Gross and Michaeli, "Illegal occupation" ("The temporary, as distinct from the indefinite, nature of occupation is thus the most necessary element of the normative regime of occupation, as it gives meaning and effect — both factual and legal — to the concepts of liberty, freedom, and the right to self-determination.").

**(c) During the occupation, the belligerent occupier is to act in the best interests of the people under occupation**

34. The occupying power, throughout the duration of the occupation, is to govern in the best interests of the people under occupation, subject only to the legitimate security requirements of the occupying military authority. This principle has been likened to a trust or fiduciary relationship in domestic or international law, where the dominant authority is required to act in the interests of the protected person or entity above all else.[54] Accordingly, the authority in power is prohibited from administering the trust in a self-serving or avaricious manner. It is also consistent with the strict requirement on the occupying power to observe, to the fullest extent possible, the human rights of the people under occupation.

35. This best interests principle is anchored in the underlying norms of the laws of occupation, specifically those provisions of the Hague Regulations and the Fourth Geneva Convention that preserve the rights of the protected people and strictly regulate the actions of the occupying power. This is consistent with the shifting of the law on occupation from its early focus on rights of States and political elites to its more contemporary focus on the protections provided for the people under occupation.[55] Article 43 of the Hague Regulations requires the occupying power to "restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". The Fourth Geneva Convention expanded these obligations by requiring the occupying power to ensure a wide spectrum of protections, including the positive duties to protect children, maintain hospitals, preserve natural resources and provide for medical supplies and food. As well, it prohibits the occupant from inflicting collective punishment, pillage, corporal punishment and engaging in individual or mass forcible transfers or deportations.[56] These protections and prohibitions, together with the application of international human rights law, underscore the centrality of the best interests principle and the trustee character of the occupying power's responsibility.

**(d) The belligerent occupier must administer the occupied territory in good faith, including acting in full compliance with its duties and obligations under international law and as a member of the United Nations**

36. The principle of good faith is a cornerstone principle of the international legal system and has become an integral part of virtually all legal relationships in modern international law.[57] It has been described as the "cardinal rule of treaty interpretation", which dominates and underlies the entire interpretive process.[58] The principle requires a State to carry out its duties and obligations in an honest, loyal, reasonable, diligent and fair manner and with the aim of fulfilling the purposes of the legal responsibility, including an agreement or treaty.[59] Conversely, the good

[54] Gross, *The Writing on the Wall*.

[55] Benvenisti, *The International Law of Occupation* ("When the Security Council announced the applicability of the law of occupation to 2003 Iraq, it had to adapt a law that initially reflected the premise that kings were sovereigns and that international law should protect their possessions during wartime, to a new philosophy — the philosophy of international *humanitarian* law — which posited that peoples were the true sovereigns and that human rights had to be respected").

[56] These rights and prohibitions under the Fourth Geneva Convention are summarized in Gross, *The Writing on the Wall*.

[57] Andreas R. Ziegler and Jorun Baumgartner, "Good faith as a general principle of (international) law", in Andrew D. Mitchell, M. Sornarajah and Tania Voon, eds., *Good Faith and International Economic Law* (Oxford, Oxford University Press, 2015).

[58] Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford, Oxford University Press, 2014).

[59] Markus Kotzur, "Good faith (bona fide)", in Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2009).

faith principle prohibits States from participating in acts that would defeat the object and purpose of the obligation, or engaging in any abuse of rights that would mask an illegal act or the evasion of an obligation.[60]

37. The duty to act in good faith is found in many of the foundational instruments of international law, including the Charter (art. 2, para. 2), the Vienna Convention on the Law of Treaties (art. 26) and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. The International Court of Justice, in the 1974 nuclear tests case, recognized the primacy of good faith in international law, stating that: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."[61]

38. Thus, under international law, a belligerent occupier is required to govern an occupied territory in good faith. This can be measured by whether the occupying power fulfils each of the three core principles governing an occupation stated above: (a) it does not annex any of the occupied territory; (b) it rules on a temporary basis only; and (c) it governs in the best interests of the protected people. As well, a belligerent occupier governing in good faith would also be required to: (d) comply with any specific directions issued by the United Nations or other authoritative bodies pertaining to the occupation,[62] and (e) comply with the specific precepts of international humanitarian law and international human rights law applicable to an occupation.

## C. Applicability of the 1971 advisory opinion of the International Court of Justice on Namibia (South West Africa)[63]

39. In June 1971, the International Court of Justice issued an advisory opinion on Namibia, at the request of the Security Council, on the legal consequences of the continued presence of South Africa in Namibia. The Court determined that South Africa's administration of the mandate for Namibia had breached several fundamental obligations under international law, that it had been validly terminated by the United Nations and that South Africa's continued presence in the territory was thenceforth illegal. The Court's advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* contains a number of applicable precedents that support both the proposed four-part legality test and the analysis as to whether Israel's continuing role as occupant remains lawful.

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[60] Steven Reinhold, "Good faith in international law", *UCL Journal of Law and Jurisprudence*, vol. 2 (2013).

[61] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, para. 46.

[62] Article 25 of the Charter of the United Nations stipulates that: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

[63] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16. The Special Rapporteur owes an intellectual debt for his reading of the Namibia decision to: John Dugard, "A tale of two sacred trusts: Namibia and Palestine", in Tiyanjana Maluwa, ed., *Law, Politics and Rights: Essays in Memory of Kader Asmal* (Leiden, The Netherlands, Martinus Nijhoff Publishers, 2014); Norman Finkelstein, *Gaza: An Inquest into its Martyrdom* (Oakland, University of California Press, 2018) (forthcoming); and Stephanie Koury, "Legal strategies at the United Nations: a comparative look at Namibia, Western Sahara and Palestine", in Susan Akram and others, eds., *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (Abingdon, United Kingdom of Great Britain and Northern Ireland, Routledge, 2011).

40. After the First World War, the League of Nations, through article 22 of the Covenant of the League, directed that South Africa was to serve as the mandatory over South West Africa. Pursuant to paragraph 1 of article 22, South Africa's mandate was to administer South West Africa as a "sacred trust of civilization" until the territory was ready for independence. As the mandatory, South Africa was obliged to administer South West Africa as a trustee acting in the best interests of the territory and its peoples. The mandatory was accountable to the League of Nations for its administration.

41. After the Second World War, the United Nations assumed responsibility for the mandate system, now known as the international trusteeship system. South Africa refused to place South West Africa under the trusteeship supervision of the United Nations and it proceeded to introduce forms of apartheid into the territory, as well as engage in the de facto annexation of the territory. In 1966, the General Assembly revoked South Africa's mandate over South West Africa and declared that South Africa had no other right to administer the territory.[64] In January 1970, the Security Council declared that South Africa's continued presence in Namibia was "illegal", and stated that South Africa's "defiant attitude" towards the decisions of the Security Council "undermine[d] the authority of the United Nations".[65] Subsequently, in July 1970, the Council requested an advisory opinion from the International Court of Justice.[66]

42. The 1971 advisory opinion on Namibia by the International Court of Justice is a sturdy and germane precedent for the assessment of Israel's continuing occupation of the Palestinian territory. Although Namibia was a mandate territory under the trusteeship system, governed by the terms of article 22 of the Covenant, and the Palestinian territory is required to be governed by the laws of occupation, they are different branches of the same tree. Both South Africa (as the mandatory power) and Israel (as the occupying power) are prime examples of alien rule, the governing power in both cases is responsible for respecting the right to self-determination of the protected people, annexation in both cases was/is strictly prohibited, both powers were/are required to govern in the best interests of the protected people and to abstain from any self-serving practices, and the international community was/is responsible in both cases for the close supervision of the alien rule and for bringing this rule to a successful conclusion.

43. In its advisory opinion, the International Court of Justice articulated the following seven legal findings and principles with respect to the mandate territory of Namibia. The Special Rapporteur submits that these legal findings and principles are directly applicable to the question of the continued legality of Israel's occupation:

(a) **Annexation is forbidden, the mandatory must act as a trustee for the benefit of the peoples of the territory, and the end result of the mandate must be the exercise of self-determination and independence;**[67]

(b) **All mandatory powers must fulfil their obligations in good faith. Acting contrary to any of the fundamental obligations of a mandate would all be evidence of a failure to satisfy the good faith obligation;**[68]

[64] See General Assembly resolution 2145 (XXI).
[65] See Security Council resolution 276 (1970).
[66] See Security Council resolution 284 (1970).
[67] *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion*, paras. 45–47, 50, 53 and 83.
[68] Ibid., paras. 53, 84, 90, 115, 116 and 128.

(c) **The strict safeguards imposed by the international community on the mandatory are to ensure that mandate territories cannot become "the objects of disguised cessions".** The mandatory cannot invoke any of its assigned rights as grounds for delaying or postponing the conclusion of the trusteeship relationship. Nor does a long occupation improve the claim of the mandatory power to annexing any of the territory of the mandate;[69]

(d) **International law is not static but evolutionary, and its interpretation is influenced by subsequent developments in the law through the Charter of the United Nations and customary international law.** Where the right exists as the general principle of law, it can be implied to be an integral part of the treaty or agreement;[70]

(e) **The deliberate and persistent violation of a party's obligations destroys the very object and purpose of the relationship or vested power, and the party cannot thereby claim any of the rights which derive from that relationship;**[71]

(f) **The breach of the mandatory's fundamental obligations under international law can render its continuing presence in the mandate territory illegal.** An illegal situation must be brought to an end, and Member States must recognize the illegality and invalidity of the situation, including the duty of non-recognition;[72]

(g) **The determination that a mandatory power is in fundamental breach of its international obligations, that the mandate is revoked and that its continued presence in the mandate territory is illegal does not affect the ongoing application of the governing legal framework protecting the peoples of the mandate.** As such, the mandatory continues to remain accountable for any violations of its international obligations and it must honour its duty to protect the rights of the peoples of the mandate.[73]

44. The 1971 advisory opinion on Namibia retains its relevance and its force of reasoning today. In 2004, the International Court of Justice, in the advisory opinion on the *Construction of a Wall*, relied upon the advisory opinion on Namibia with respect to its findings on the applicability of the right to self-determination to non-self-governing territories, including the Occupied Palestinian Territory.[74] The overriding similarities between the two situations (an alien power using the mask of an international supervisory regime to assert permanent control in a trust relationship) means that the legal principles pertaining to the illegal continuation by a mandatory of a mandate apply, mutatis mutandis, to the determination of whether an occupying power's ongoing occupation has become illegal.

## D. Application of the legality test to Israel's occupation

### Prohibition against annexation

45. Israel's formal annexation of East Jerusalem in 1967 and 1980, and its de facto annexation of significant parts of the West Bank, are intended to solidify its claim for sovereignty. This constitutes a flagrant breach of the absolute prohibition against annexation and violates Israel's obligations under international law.

[69] Ibid., paras. 54, 55, 66, 82 and 83.
[70] Ibid, paras. 52, 53, 96–98, 100 and 133.
[71] Ibid., paras. 84, 91, 95, 96, 98, 100 and 102.
[72] Ibid., paras. 108, 109, 111, 115, 117, 122 and 123.
[73] Ibid., paras. 118 and 125.
[74] *Legal Consequences of the Construction of a Wall, Advisory Opinion*, para. 88.

46. After capturing the Palestinian territory (the West Bank, including East Jerusalem, and Gaza) in the June 1967 war, Israel annexed East Jerusalem and parts of the West Bank in late June 1967 by a Cabinet decision. In July 1967, the General Assembly unanimously denounced the annexation and called upon Israel to rescind the measures that would alter the status of Jerusalem.[75] Subsequently, in July 1980, the Israeli Knesset adopted the Basic Law on Jerusalem, declaring Jerusalem to be the "complete and united" capital of Israel. The Security Council in August 1980 censured Israel "in the strongest terms" for its enactment of the Basic Law, affirmed that the Law was in breach of international law, and determined that Israel's annexation was "null and void" and "must be rescinded forthwith."[76] Israel remains non-compliant with all United Nations resolutions on Jerusalem, there are presently about 210,000 Israeli settlers living in occupied East Jerusalem, and Israel has stated that it will not leave East Jerusalem.[77]

47. Beyond Jerusalem, Israel is actively establishing the de facto annexation of parts of the occupied West Bank. The International Court of Justice, in the advisory opinion on the *Construction of a Wall*, warned that the reality of the wall and the settlements regime was constituting a fait accompli and de facto annexation.[78] The Association for Civil Rights in Israel has characterized Israel's regime in the West Bank as an "occunexation."[79] Professor Omar Dajani has observed that, given the absolute prohibition today in international law against conquest, acquisitive States have an incentive to obfuscate the reality of annexation.[80] In the West Bank, Israel exercises complete control over Area C (making up 60 per cent of the West Bank), where its 400,000 settlers live in approximately 225 settlements. The settlers live under Israeli law in Israeli-only settlements, drive on an Israeli-only road system, and benefit greatly from the enormous sums of public money spent by Israel on entrenching, defending and expanding the settlements. Few of these benefits, except incidentally, flow to the Palestinians in Area C. Only 1 per cent of Area C is designated for Palestinian use, notwithstanding the approximately 300,000 Palestinians who live there.[81] What country would invest so heavily over so many years to establish so many immutable facts on the ground in an occupied territory if it did not intend to remain permanently?[82]

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[75] See General Assembly resolutions 2253 (ES-V) and 2254 (ES-V).

[76] See Security Council resolution 478 (1980). See also Council resolution 476 (1980).

[77] Prime Minister of Israel, Benjamin Netanyahu, in 2015: "Forty-eight years ago, the division of Jerusalem was ended and we returned to be united ... We will keep Jerusalem united under Israeli authority." Available from www.cnn.com/2015/05/17/middleeast/israel-netanyahu-united-jerusalem/.

[78] *Legal Consequences of the Construction of a Wall, Advisory Opinion*, para. 121.

[79] Association for Civil Rights in Israel, "49 years of control without rights: human rights of the Palestinians in the West Bank and East Jerusalem — what has changed?", available from www.acri.org.il/en/wp-content/uploads/2016/06/49years2016-en.pdf.

[80] Omar M. Dajani, "Israel's creeping annexation", *American Journal of International Law Unbound*, vol. 111 (2017).

[81] Orhan Niksic, Nur Nasser Eddin and Massimiliano Cali, *Area C and the Future of the Palestinian Economy* (Washington, D.C., World Bank, 2014); and Diakonia International Humanitarian Law Resource Centre, "Planning to fail: the planning regime in Area C of the West Bank — an international law perspective" (2013).

[82] Benjamin Netanyahu, Prime Minister, Israel, in August 2017: ("We are here to stay forever. There will be no further uprooting of settlements in the Land of Israel ... This is our land.") Available from www.latimes.com/world/middleeast/la-fg-israel-netanyahu-settlements-20170828-story.html.

**Occupations must be temporary, and not indefinite or permanent**

48. Israel's occupation is 50 years old, and counting. The duration of this occupation is without precedent or parallel in today's world.[83] Professor Adam Roberts has stated that an occupation becomes prolonged if it lasts longer than five years into a period, closely resembling peacetime, when hostility is reduced.[84] Modern occupations that have broadly adhered to the strict principles concerning temporariness, non-annexation, trusteeship and good faith have not exceeded 10 years, including the American occupation of Japan, the Allied occupation of western Germany and the American-led coalition's occupation of Iraq.[85]

49. Employing the precept that the longer the occupation, the greater the onus on the occupying power to justify its continuation, Israel lacks any persuasive reason to remain as the occupant after 50 years. Israel has signed peace treaties with Egypt (1981) and Jordan (1994) that have stood the test of time, and the absence of peace agreements with its other two neighbours (the Syrian Arab Republic and Lebanon) cannot be invoked to justify its continuing occupation of the Palestinian territory. Contrary to the repeated declarations by many Israeli leaders, the Palestinian Authority is accepted by the international community as a legitimate negotiating partner for peace. The primary engine of Israel's ongoing occupation — the settlement enterprise — detracts from, rather than enhances, Israel's security.[86] Professor Gershon Shafir has written that: "A circular logic is in play here: Israel is able to use the stipulation of the temporary character of occupation to make long-term changes in the name of extended security risks, many of which are the result of the violations of the law of occupation."[87]

50. The only credible explanation for Israel's continuation of the occupation and its thickening of the settlement regime is to enshrine its sovereign claim over part or all of the Palestinian territory, a colonial ambition par excellence. Every Israeli Government since 1967 has pursued the continuous growth of the settlements, and the significant financial, military and political resources committed to the enterprise belies any intention on its part to make the occupation temporary.[88] Every Israeli Government since 1967 has left office with more settlers living in the occupied territory than when it assumed office. (Certainly, in various peace negotiation rounds in the 1990s and the 2000s, Israeli leaders had proposed to withdraw from some of the West Bank, but even in the most advanced of these negotiations — under Prime Minister Ehud Olmert between 2006 and 2008 — Israel insisted on keeping many of its settlements in East Jerusalem and the West Bank in any final agreement.)[89] The current Israeli Government is strongly committed to deepening

[83] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge, Cambridge University Press, 2009).

[84] Adam Roberts, "Prolonged military occupation: the Israeli Occupied Territories since 1967", *American Journal of International Law*, vol. 84, No. 1 (January 1990).

[85] These three occupations are sometimes cited as examples of "transformative" occupations, which raise separate legal questions that are not addressed in the present report. See, generally, Gregory H. Fox, "Transformative occupation and the unilateralist impulse", *International Review of the Red Cross*, vol. 94, No. 885 (Spring 2012).

[86] Israeli Council for Peace and Security (June 2012), quoted in Gershon Shafir, *A Half Century of Occupation: Israel, Palestine, and the World's Most Intractable Conflict* (Oakland, University of California Press, 2017), para. 98.

[87] Shafir, *A Half Century of Occupation*.

[88] Idith Zertal and Akiva Eldar, *Lords of the Land: the War Over Israel's Settlements in the Occupied Territories, 1967-2007* (New York, Nation Books, 2007).

[89] Dajani, "Israel's creeping annexation".

the settlement enterprise.[90] Professor Shafir observes that "temporariness remains an Israeli subterfuge for creating permanent facts on the ground", with Israel able to employ the seemingly indeterminate nature of the occupation's end-point to create a "permanent temporariness" that intentionally forestalls any meaningful exercise of self-determination and independence by the Palestinians.[91]

51. The Israeli occupation has long exceeded the temporariness principle under international law. It has not acted in a manner consistent with the requirement that it take all necessary steps to bring the occupation to a successful close in as reasonable and expeditious a time period as possible. Indeed, far from it. Whether the occupation is said to be indefinite or permanent, the lack of a persuasive justification for its extraordinary duration places Israel, as the occupying power, in violation of international law.

**Best interests/trust principle**

52. Under international law, Israel is required to administer the Occupied Palestinian Territory in the best interests of the Palestinian people, the protected people under occupation, subject only to justified security concerns. It is prohibited from governing the occupied territory in an acquisitive or self-interested manner. Contrary to these requirements, Israel has acted in its own expansionary interests unaccompanied by most of the responsibilities attached to a belligerent occupier.

53. The social and economic impact of the occupation on the Palestinians in the occupied territory, which had always been disadvantageous, has become increasingly dire in recent years. According to recent reports by the World Bank[92] and the United Nations,[93] the expanding Israeli settlement enterprise and the supporting apparatus of occupation has deepened the already separate and distinctly inferior civil and economic conditions imposed upon Palestinians in the West Bank. There, the Palestinians are subject to a harsh and arbitrary legal system quite unequal to that enjoyed by the Israeli settlers.[94] Much of the West Bank is off-limits to Palestinians, and they regularly endure significant restrictions on their freedom of movement through closures, roadblocks, and the need for hard-to-obtain travel permits.[95]

54. Access to the natural resources of the occupied territory, especially to water, is disproportionately allocated to Israel and the settlers.[96] Similarly, the planning system administered by the occupying power for housing and commercial development throughout the West Bank, including East Jerusalem, is deeply discriminatory in favour of settlement construction, while imposing significant barriers on Palestinians,[97] including ongoing land confiscation,[98] home demolitions

[90] Samantha Power, Permanent Representative of the United States of America to the United Nations, "Speech after abstention on anti-settlement vote", New York, 23 December 2016. ("The Israeli Prime Minister recently described his government as 'more committed to settlements than any in Israel's history'…"). Available from www.timesofisrael.com/full-text-of-us-envoy-samantha-powers-speech-after-abstention-on-anti-settlement-vote/.

[91] Shafir, *A Half Century of Occupation*.

[92] World Bank, "West Bank and Gaza: Area C and the future of the Palestinian economy", report No. AUS2922 (2013).

[93] Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, "Fragmented lives: humanitarian overview 2016" (2017).

[94] Limor Yehuda and others, "One rule, two legal systems: Israel's regime of laws in the West Bank" (Association for Civil Rights in Israel, 2014).

[95] See Human Rights Watch, *World Report 2017: Events of 2016*. Available from www.hrw.org/world-report/2017/country-chapters/israel/palestine.

[96] Amnesty International, "Troubled waters: Palestinians denied fair access to water" (London, 2009).

[97] Human Rights Watch, "Separate and unequal: Israel's discriminatory treatment of Palestinians in the Occupied Palestinian Territories", 19 December 2010. Available from www.hrw.org/report/2010/12/19/separate-and-unequal/israels-discriminatory-treatment-palestinians-occupied.

and the denial of building permits.[99] Israel employs practices that in some cases may amount to the forcible transfer of Palestinians, primarily those living in rural areas, as a means of confiscating land for settlements, military weapons training areas and other uses exclusive to the occupying power that have little or nothing to do with its legitimate security requirements.[100]

55. As for East Jerusalem, the occupation has increasingly detached it from its traditional national, economic, cultural and family connections with the West Bank because of the wall, the growing ring of settlements and related checkpoints, and the discriminatory permit regime. It is neglected by the municipality in terms of services and infrastructure,[101] the occupation has depleted its economy and the Palestinians have only a small land area on which to build housing.[102]

56. In Gaza, Israel vacated its formal presence in 2005, but its effective control over the Strip — through its dominance over Gaza's land and sea frontiers and its air space — means that it retains its responsibilities as an occupier. As Tamir Pardo, former head of Israel's Mossad, stated recently: "Israel is responsible for the humanitarian situation [in Gaza], and this is the place with the biggest problem in the world today."[103] Since 2007, Israel has maintained a suffocating economic and travel blockade that has driven Gaza back to the dark ages. More than 60 per cent of the population of Gaza is reliant upon humanitarian aid, it is unable to secure more than one third of the electrical power that it requires, it will soon exhaust its sources of safe drinking water and, virtually unique in the world, its gross domestic product is actually lower than it was in 2006.[104]

57. All these restrictions in the civil and commercial life of the Palestinians have created a shattered economic space which has resulted in a highly dependent and strangled economy, mounting impoverishment, daily impositions and indignities, and receding hope for a reversal of fortune in the foreseeable future.[105]

58. On the probative evidence, Israel, the occupying power, has ruled the Palestinian Territory as an internal colony, deeply committed to exploiting its land and resources for Israel's own benefit, and profoundly indifferent, at very best, to the rights and best interests of the protected people.[106] As such, Israel is in breach of

[98] Adam Aloni, *Expel and Exploit: The Israeli Practice of Taking Over Rural Palestinian Land* (B'Tselem, 2016).

[99] Office for the Coordination of Humanitarian Affairs, "Fragmented lives".

[100] Simon Reynolds, *Coercive Environments: Israel's Forcible Transfer of Palestinians in the Occupied Territory* (Badil Resource Centre for Palestinian Residency and Refugee Rights, 2017).

[101] Association for Civil Rights in Israel, "East Jerusalem: facts and figures 2017", 21 May 2017. Available from http://www.acri.org.il/en/wp-content/uploads/2017/05/Facts-and-Figures-2017-1.pdf.

[102] United Nations Conference on Trade and Development (UNCTAD), "The Palestinian economy in East Jerusalem: enduring annexation, isolation and disintegration", document UNCTAD/GDS/APP/2012/1.

[103] Gili Cohen, "Ex-Mossad chief says occupation is Israel's only existential threat", *Haaretz*, 22 March 2017. Available from www.haaretz.com/israel-news/1.778650.

[104] United Nations country team in the Occupied Palestinian Territory, "Gaza ten years later", July 2017. Available from https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf.

[105] UNCTAD, "Report on UNCTAD assistance to the Palestinian people: developments in the economy of the Occupied Palestinian Territory", document UNCTAD/APP/2016/1. In this report, UNCTAD estimated that the Palestinian economy would be twice its present size in the absence of the Israeli occupation.

[106] David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Palestinian Territories* (Albany, State University of New York Press, 2002) ("On the political level, the government relates to the Occupied Territories as colonies, with all that this entails: exploitation of their resources and markets for the benefit of the home country and its citizens and a clear distinction between the status of the "natives" and those of the settlers.").

its obligations to administer the occupation as a trustee for the well-being of the protected people under occupation.

**Good faith**

59. For an occupying power to govern an occupied territory in good faith, it must not only comply with the three principles stated above, but it must also be fully compliant with any specific directions issued by the United Nations or other authoritative bodies pertaining to the occupation. Further, it must comply with the specific precepts of international law, including humanitarian law and human rights law, applicable to an occupation.

60. Since 1967, the Security Council has adopted, in clear and direct language, more than 40 resolutions pertaining to Israel's occupation of the Palestinian Territory. On the settlements, the Council has variously stated that they "have no legal validity", they must be "dismantled" and they constitute a "flagrant violation under international law", and that settlement activities must "immediately and completely cease" and they "are dangerously imperilling the viability of a two-state solution".[107] Similarly, the Council has affirmed, with specific reference to the Israeli occupation, that the acquisition of territory by war or by force is inadmissible.[108] The Council has censured "in the strongest terms" Israel's annexation of East Jerusalem, it has "deplored" Israel's "persistence in changing the physical character, demographic composition ... and status of the Holy City of Jerusalem", it has called these changes a "flagrant violation" of the Fourth Geneva Convention, and it has stated that these changes "must be rescinded."[109] Repeatedly, the Security Council has affirmed that the Fourth Geneva Convention applies to the Occupied Palestinian Territory and has called upon Israel to "scrupulously" abide by it.[110]

61. In the face of the persistent Israeli refusal to accept and apply any of these resolutions, the Security Council has "strongly deplored the continued refusal of Israel, the occupying power, to comply with the relevant resolutions of the Council and the General Assembly."[111] Immediately following the adoption of resolution 2334 (2016) by the Council in December 2016 condemning the settlement enterprise and Israel's failure to apply the Fourth Geneva Convention, Mr. Netanyahu sharply criticized the resolution and announced that Israel would not submit to it.[112] In October 2017, the United Nations Special Coordinator for the Middle East Peace Process reported to the Council that Israel was not complying with the resolution and that indeed its settlement activity was continuing at a high rate.[113]

62. Israel has been deemed to be in breach of many of the leading precepts of international humanitarian and human rights law. Its settlement enterprise has been characterized as illegal by the Security Council.[114] The prohibited use of collective

[107] See Security Council resolutions 2334 (2016), 465 (1980), 452 (1979) and 446 (1979).

[108] See Security Council resolutions 2334 (2016), 497 (1981), 478 (1980), 476 (1980), 298 (1971), 267 (1969), 252 (1968) and 242 (1967).

[109] See Security Council resolutions 2334 (2016), 478 (1980) and 476 (1980).

[110] See Security Council resolutions 2334 (2016), 478 (1980), 476 (1980), 471 (1980), 465 (1980), 452 (1979) and 446 (1979).

[111] See Security Council resolutions 478 (1980), 476 (1980) and 446 (1979).

[112] Isabel Kershner, "Netanyahu promises retribution for 'biased' U.N. resolution", *New York Times*, 24 December 2016. Available from www.nytimes.com/2016/12/24/world/middleeast/israel-benjamin-netanyahu-united-nations.html.

[113] Nickolay Mladenov, Special Coordinator for the Middle East Peace Process, "Briefing to the Security Council on the situation in the Middle East: report on Council resolution 2334 (2016)", 25 September 2017. Available from https://reliefweb.int/report/occupied-palestinian-territory/nickolay-mladenov-special-coordinator-middle-east-peace-3.

[114] See Security Council resolutions 2334 (2016), 478 (1980), 476 (1980), 471 (1980), 465 (1980), 452 (1979) and 446 (1979).

punishment has been regularly employed by Israel through the demolition of Palestinian homes of families that are related to those suspected of terrorism or security breaches and by extended closures of Palestinian communities (which resumed in 2014, after a moratorium lasting since 2006).[115] Bedouin communities in the West Bank and East Jerusalem are the latest Palestinian communities to be at risk of forcible transfer instigated by the occupying power.[116] The right to liberty, with its accompanying right not to be subjected to arbitrary arrest, are violated by the high rates of arbitrary detention, including administrative detention, and the revocation of the residency rights of many thousands of Palestinians.[117] Freedom of movement is impaired through a complex system of administrative, bureaucratic and physical constraints that affects virtually every aspect of daily life for the Palestinians.[118] And above all, the entrenched and unaccountable occupation — through its denial of territorial integrity, genuine self-governance, a sustainable economy and a viable path to independence — substantively violates, and undermines, the right of the Palestinians to self-determination, the platform right that enables the realization of many other rights.

63. Whether measured by the criteria of substantive compliance with United Nations resolutions or by the satisfaction of its obligations as occupier under the framework of international law, Israel has not governed the Occupied Palestinian Territory in good faith. As a United Nations Member State with obligations, it has repeatedly defied the international community's supervisory authority over the occupation. As the occupant, it has consciously breached many of the leading precepts of international humanitarian law and international human rights law that govern an occupation.

## IV. Conclusion

64. International law is the promise that States make to one another, and to their people, that rights will be respected, protections will be honoured, agreements and obligations will be satisfied, and peace with justice will be pursued. It is a tribute to the international community that it has sustained this vision of international law throughout its supervision of Israel's occupation of the Palestinian territory. But it is no tribute that — as the occupation deepened, as the occupier's intentions became crystal clear, and as its defiance grew — the international community recoiled from answering Israel's splintering of the Palestinian territory and disfiguring of the laws of occupation with the robust tools that international law and diplomacy provide. International law, along with the peoples of Palestine and Israel, have all suffered in the process.

65. States who administer another territory under international supervision — whether as an occupier or a mandatory power — will cross the red line into illegality if they breach their fundamental obligations as alien rulers. The International Court of Justice in its advisory opinion on Namibia supports this conclusion. The Special Rapporteur submits that Israel's role as occupant has crossed this red line. The challenge now facing the international community is to

[115] See www.btselem.org/topic/punitive_demolitions.

[116] Office for the Coordination of Humanitarian Affairs, "Demolition and seizure of service infrastructure in Palestinian communities in Area C exacerbates risk of forcible transfer", 11 October 2017. Available from www.ochaopt.org/content/demolition-and-seizure-service-infrastructure-palestinian-communities-area-c-exacerbates.

[117] Human Rights Watch, "Israel: 50 years of occupation abuses", 4 June 2017. Available from www.hrw.org/news/2017/06/04/israel-50-years-occupation-abuses.

[118] Office of the United Nations High Commissioner for Human Rights, "Freedom of movement: human rights situation in the Occupied Palestinian Territory, including East Jerusalem" (February 2016). Available from www.ohchr.org/Documents/Countries/PS/SG_Report_FoM_Feb2016.pdf.

assess this analysis and, if accepted, to devise and employ the appropriate diplomatic and legal steps that, measure by measure, would completely and finally end the occupation. As Amos Schocken, the publisher of *Haaretz*, has written about his own country's leadership: "... international pressure is precisely the force that will drive them to do the right thing."[119]

66. A determination that Israel's role as occupant is now illegal would serve several significant purposes. First, it would encourage Member States to take all reasonable steps to prevent or discourage national institutions, organizations and corporations within their jurisdiction from engaging in activities that would invest in, or sustain, the occupation. Second, it would encourage national and international courts to apply the appropriate laws within their jurisdiction that would prevent or discourage cooperation with entities that invest in, or sustain, the occupation. Third, it would invite the international community to review its various forms of cooperation with the occupying power as long as it continues to administer the occupation unlawfully. Fourth, it would provide a solid precedent for the international community when judging other occupations of long duration. Most of all, such a determination would confirm the moral importance of upholding the international rule of law when aiding the besieged and the vulnerable.

## V. Recommendations

67. **The Special Rapporteur recommends that the Government of Israel bring a complete end to the 50 years of occupation of the Palestinian territories in as expeditious a time period as possible, under international supervision.**

68. **The Special Rapporteur also recommends that the General Assembly:**

(a) **Commission a United Nations study on the legality of Israel's continued occupation of the Palestinian territory;**

(b) **Consider the advantages of seeking an advisory opinion from the International Court of Justice on the question of the legality of the occupation;**

(c) **Consider commissioning a legal study on the ways and means that Member States can and must fulfil their obligations and duties to ensure respect for international law, including the duty of non-recognition, the duty to cooperate to bring to an end a wrongful situation and the duty to investigate and prosecute grave breaches of the Geneva Conventions;**

(d) **Consider the adoption, in accordance with General Assembly resolution 377 (V), entitled "Uniting for peace", of a resolution with respect to the question of Palestine, in the event that there is a determination that Israel's role as occupier is no longer lawful.**

[119] Amos Schocken, "Only international pressure will end Israeli apartheid", *Haaretz*, 22 January 2016. Available from www.haaretz.com/opinion/.premium-1.698874.

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**Seventy-second session**
Agenda item 51
**Effects of atomic radiation**

# Membership of the United Nations Scientific Committee on the Effects of Atomic Radiation

## List of Member States expressing interest in membership

The following list has been prepared pursuant to paragraph 18 of General Assembly resolution 71/89, in which the Assembly recalled paragraph 19 of its resolution 66/70 and requested the Secretary-General to provide a list of the Member States that have expressed their particular interest, by 11 September 2017, in membership in the Scientific Committee on the Effects of Atomic Radiation:

Algeria

Iran (Islamic Republic of)

Norway

United Arab Emirates

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